SUPREME COURT, U. S.

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No. 1232

In the Supreme Court of the United States

OCTOBER TERM, 1967

ROBERT GENE HOLBROOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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After a jury trial in the United States District Court for the Northern District of Ohio, petitioner and two others were found guilty of conspiracy to transport a woman in interstate commerce for the purpose of prostitution, in violation of 18 U.S.C. 2421 (R. 1, 31). On February 10, 1967, petitioner was sentenced to imprisonment for five years pursu-

ant to 18 U.S.C. 4208(a)(2) (R. 64; Pet. App. 8). The court of appeals affirmed.

At the trial, Mrs. Kathleen Vogan Plake testified that on April 21, 1964 co-defendant Mike Groff told her he was taking her to Steubenville, Ohio, to meet petitioner, and then to Wheeling, West Virginia, to work as a prostitute (Tr. 24-25).[1] The same day petitioner, Groff and co-defendant Kufchak transported Mrs. Plake from Steubenville to Wheeling in petitioner's car (Tr. 27-28). On the following day, in Wheeling, petitioner gave Mrs. Plake a paper with the address of Nellie Garrison, the operator of a house of prostitution, and a cab driver took Mrs. Plake to this house (Tr. 35-37). There, she participated in an act of prostitution (Tr. 38-39).

Petitioner did not testify but he did offer witnesses to establish an alibi defense, that he was in New Jersey on April 20th and 21st, 1964. In support of this defense, an attorney named Weitzman testified that on April 20, 1964, between 7:00 and 10:00 p.m., petitioner was at his office in Lynden, New Jersey, for the signing of a power of attorney (Tr. 146-148). Mr. Weitzman testified that the power of attorney had been prepared some time between 9:00 a.m. and 5:00 p.m. that day in his office (Tr. 147-148). Petitioner's sister, Mrs. Harris, and his mother, Mrs. Holbrook, testified that the power of attorney was drawn up by the attorney's secretary and an insurance man in petitioner's presence during the evening of April 20 (Tr. 167, 198, 199).

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[1] "Tr." refers to the transcript of the trial testimony.

In his closing argument to the jury government counsel stated (Tr. 268-269):

> Now Mr. Darvanan, counsel for the defendants, will have occasion to speak to you and to argue to you on the evidence in the way most favorable to his clients, but I want you to listen for a few things when he is talking to you. I think there is a very definite explanation needed by him in order for you to make the proper determination. I think you are entitled to hear from the defendants as to why Attorney Weitzman would come in and would testify that this document was drawn up between the hours of nine and five, whereas Mrs. Harris and Mrs. Holbrook testified that it was drawn up in their presence with the secretary there, without the lawyer being present. Why is there this inconsistency?

The following colloquy occurred during the closing argument of defense counsel (Tr. 271):

> MR. DARVANAN: * * * Mr. Jones [government counsel] wants to know why Mr. Weitzman would say that this document was drawn up between the hours of nine and five, and I will tell you why, it was because he was not there when this paper was drawn up, and he does not actually know when it was drawn up. Mr. Jones told you that you are entitled to an explanation from the defendants—
>
> THE COURT: No—
>
> MR. DARVANAN: That is what he said.
>
> THE COURT: From you.
>
> MR. DARVANAN: Then I take exception as to what he said, and it is on the record.

> THE COURT: No, you would like to make it that, but he did not say that. Proceed with your argument.[2]

In closing argument government counsel also stated, over defense objection, that the jury was "entitled to an explanation" as to why Mrs. Plake would admit that she was a prostitute and had been transported to a house of prostitution in Wheeling if this were not true (Tr. 269-270). The government attorney also told the jury to listen for an explanation from defense counsel as to why Mrs. Plake accused the three defendants of transporting her and putting her into the house of prostitution if that did not happen (Tr. 270-271).

In the court's charge, to which defense counsel had no objection (Tr. 313), the following was included (Tr. 321):

> There is one most important matter which I wish to call to your attention. None of the defendants on trial have taken the witness stand

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[2] The district court minutes show that the reporter filed a transcript of the proceedings on April 18, 1967. Thereafter, before the case was decided by the court of appeals, the government attorney filed in the district court the following certificate of the official court reporter:

> I do hereby certify that after checking my shorthand notes of the above transcript, a typographical error was made on page 268 and line 24 reading as follows: "I think you are entitled to hear from the defendants * * *" should read: "I think you are entitled to hear from the defense * * *."

This certificate does not appear in the record presently before this Court, but it was filed as an appendix to the government's brief in the court of appeals.

> and testified. I instruct you that the law does not require a defendant in a criminal case to take the witness stand and testify, and absolutely no presumption of guilt may be raised, and no inferences of any kind may be drawn, from the failure of a defendant to testify.

Petitioner's entire argument is based upon the erroneus premise that the prosecutor made improper references to petitioner's failure to take the stand. The test as to whether there was such an improper statement is whether the language was "manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Knowles* v. *United States*, 224 F.2d 168, 170 (C.A. 10). Here the references complained of were not a comment upon petitioner's failure to testify; they were merely a way of calling attention to the discrepancy in the testimony of defense witnesses and the unlikelihood that the government witness would falsely accuse herself. The prosecutor was simply advising the jury that during the summation of defense counsel, which was to follow, they should listen to how he attempted to explain these matters.

In addition, the jury was emphatically instructed that "absolutely no presumption of guilt may be raised, and no inferences of any kind may be drawn, from the failure of a defendant to testify" (Tr. 321). *United States* v. *DiCarlo*, 64 F.2d 15, 17-18 (C.A. 2); *United States* v. *Edwards*, 366 F.2d 853, 871 (C.A. 2), certiorari denied *sub nom. Jakob* v. *United States*, 386 U.S. 908; *United States* v. *Wright*, 309

F.2d 735, 739 (C.A. 7), certiorari denied, 372 U.S. 929. It must be presumed that the jury followed the court's instructions. *Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

As noted *supra*, n. 2, the court reporter certified that her shorthand notes indicated that the prosecutor referred to the "defense" not the "defendants" in the portion of the charge here being attacked. However, the record was never corrected by an order of either the district court or the court of appeals after the certification of the court reporter. Although the court of appeals wrote no opinion, it must be presumed that the court of appeals decided the case on the record before it without the certification of correction. It is thus irrelevant whether there was sufficient compliance with Rules 36 and 39(b)(1), F.R. Crim. P. and Rule 75(h), F.R. Civ. P. Even on the uncorrected record, the prosecutor's summation cannot be reasonably interpreted as a comment upon petitioner's failure to testify. Just prior to the phrase, "I think you are entitled to hear from the defendants", the prosecutor had called defense counsel by name and had asked for a "definite explanation" by him as to the inconsistency in the testimony of the defense witnesses (Tr. 268-269). It is also significant that, at a time when the matter was fresh in the trial judge's mind, he was certain that the prosecutor had not told the jury that they were "entitled to an explanation from the defendants", even though he thought defense counsel would "like to make it that" (Tr. 271).

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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